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IN THE

# Supreme Court of the United States

OCTOBER TERM 1979

NO. 79-1702

DAVID W. CARTER, JR.,

Petitioner

V.

CROWN HOSIERY MILLS, INC.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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DAVID W. CARTER, JR.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, DAVID W. CARTER, JR., prays that a writ of certiorari issue to review the opinion and judgment rendered in these proceedings on January 29, 1980.

## OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears at Appendix A, infra, p. 18. The opinion of the United States District Court for the Middle District of

North Carolina is unreported and appears at Appendix B, infra, p. 20.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1980. See Appendix A, p. 18, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Is unequivocal oral notice of a charge of discrimination based on age and of an intent to sue given to the Department of Labor sufficient to comply with the notice requirements of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq., in an action commenced prior to the 1978 Amendments to the Act?

STATUTORY PROVISIONS INVOLVED

Prior to its amendment in 1978, 29 U.S.C. §621(d) provided in pertinent part



the following:

(d) No civil action may be commenced by any individual under this section until the individual has given the secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed --

(1) within 180 days after the alleged unlawful practice occurred . . .

Upon receiving a notice of intent to sue the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to remedy any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF FACTS

The central facts in this case are not disputed. On September 30, 1974, the petitioner, David W. Carter, Jr., was discharged by Crown Hosiery Mills, Inc. The next day, October 1, 1974, the petitioner went to the High Point, North Carolina, Wage and Hour Division Office of the United States Department of Labor and talked to the Department of Labor's staff member,

Harold Cox. Carter told Cox that he had been discharged because of his age and he stated that he "wanted to start a legal action [,] . . . wanted to file a civil suit against Crown Hosiery Mills for discrimination." Cox replied that "he didn't see where he could do anything to help." Carter and advised him to see an attorney. Cox did not initiate any conciliation efforts with Crown Hosiery Mills, Inc. The petitioner contacted several attorneys before he was able to reach an agreement with one to represent him. After finally retaining counsel, the petitioner filed the present suit on January 12, 1977, in the United States District Court for the Middle District of North Carolina. The District Court granted the employer's motion for summary judgment concluding that the oral statements were insufficient to constitute the requisite filing of notice of intent to sue. The United



States Court of Appeals for the Fourth Circuit affirmed in a per curiam opinion relying upon the opinion of the District Judge.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ARTICULATED IN OSCAR MAYER & CO. V. EVANS FOR THE CONSTRUCTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

The opinion of the Fourth Circuit deviated from the methodology established by this Court for analyzing the provisions of the Age Discrimination In Employment Act of 1967 [hereinafter "ADEA"]. Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979). After applying an improper method of analysis the Court below reached a conclusion which is clearly inconsistent with the language and policies of the Act.

This Court held in Oscar Mayer that both Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq [hereinafter "Title VII"] and the Fair Labor Standards

Act of 1938, 29 U.S.C. §201 et seq [hereinafter "FLSA"], should be examined for guidance when seeking to interpret the provisions of the ADEA. When the notice provision of §706(b) of Title VII [42 U.S.C. §200e-5(b)] and the enforcement procedures of the Equal Employment Opportunity Commision are contrasted to the notice provision of §7(d) of the ADEA [28 U.S.C. §626(d)] and the enforcement procedures of the Department of Labor, it is clear that written notice is not mandatory under the ADEA. The courts which have followed this analysis, now approved in Oscar Mayer, have ruled that oral notice is sufficient.[1/] In contract, the courts

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1. Noto v. JFD Electronics Corp., 446 F.Supp. 92 (E.D.N.C. 1978); Sutherland v. SKF Industries, Inc., 419 F.Supp. 610 (E.D.Pa. 1976); Woodford v. Kinney Shoe Corp., 369 F.Supp. 911 (N.D.Ga. 1973). See, Reich v. Dow Badische Co., 575 F.2d 363, 374 (2d Cir. 1978) (dissenting opinion), cert. denied, 439 U.S. 1006 (1978). See also, Bishop v. Jelleff Assoc., 398 F.Supp. 579



which have not followed this analysis have dismissed all claims lacking written notice.[2/] This case presents a matter of legal significance by asking this Court to further clarify its method for analyzing the provisions of the ADEA in order that the split of the authority will be reconciled and that lower courts will be guided authoritatively in the future construction of the Act.

In Oscar Mayer this Court suggested that in analyzing a given section of the ADEA one should examine the portion of either Title VII or the FLSA from which it

---

1. (Continued)

(D.D.C. 1974), wherein the Court held oral notice sufficient although it did not note a comparison to Title VII.

2. See, e.g., Reich v. Dow Badische Co., supra; Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977); Enos v. Kaiser Industries Corp., 443 F. Supp. 798 (D.D.C. 1978); Hughes v. Beaunit Corp., 12 F.E.P. Cases 1564 (E.D. Tenn. 1976).

is most likely derivative to aid in the analysis. Section 7(b) of the ADEA [29 U.S.C. §626(b)] states that the "powers, remedies and procedures" of the FLSA will be used in the ADEA. There are no notice requirements, much less written notice requirements, prerequisite to filing suit under the FLSA. It is therefore likely that the notice requirement of the ADEA was adopted from the notice requirements of §706(b) of Title VII [42 U.S.C. §2000e-5(b)], which clearly states that "charges shall be in writing under oath." This point was made in dissent in Reich v. Dow Badiche Co., 575 F.2d 363, 374 (2d Cir. 1978), cert. denied, 439 U.S. 1006 (1978). The Court in Noto v. JFD Electronics Corp., 446 F.Supp. 92 (E.D.N.C. 1978), also recognized the propriety of this analysis and concluded:

> Thus Congress is aware of the appropriate language to use when it unequivocally desires to make written notice the only permissible



> mode. Its failure to adopt this language in the subsequently passed ADEA aids plaintiff's position . . . . "Certainly the idea of 'filing' an oral complaint or notice does not . . . stretch the word beyond the range of its ordinary meaning and usage" . . . . This is particularly true where the notice serves not to institute a formal judicial proceeding but rather to trigger a conciliatory administrative investigation.

446 F.Supp. at 94. (Citations omitted).

This conclusion is strengthened by the fact that the original regulations of the EEOC implementing Title VII's written notice requirement called for its employees to receive information from complainants and to assist individuals in filing a charge or to file a charge for them. See, 29 CFR §1601.5, 30 FR 847, July 1, 1965. The regulations implementing the ADEA contain no similar provisions. See, 29 CFR §850.1 et seq., 34 FR 19193, Dec. 4, 1969. Accordingly, it is clear that receipt of the information and not the form of that notice is the key to fulfilling the

procedural requirements of the ADEA.

Finally, it must be noted that §14(b) of the ADEA [29 U.S.C. §633(d)] specifically requires written notice to fulfill the notice requirements to a state agency ("the filing or a written and signed statement"). Thus, where Congress intended written notice it unequivocally demanded such in both Title VII and the ADEA.

The analysis utilized in Oscar Mayer should clarify the uncertainty which arose in the lower courts following Lorillard v. Pons, 434 U.S. 575 (1978). Following Lorillard, some courts ruled that any comparison to Title VII was improper when construing the provisions of the ADEA.[3/]

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3. See e.g., Holliday v. Ketchum, MacLeod & Grove, Inc., 585 F.2d 1221, 1225 (3rd Cir. 1978) (en banc), where the Court held that this Court "explicitly rejected the relevance of Title VII procedures to lawsuits which allege age discrimination." 584 F.2d at 1225. (Emphasis in the original.)



In fact, the cases which the Fourth Circuit relied upon in its decision in the present case reflect this reasoning. In Reich, the majority of the concurring opinions do not examine §7(d) in the context of §706(b) of Title VII. The Fifth Circuit has similarly failed to look to Title VII for guidance holding that oral notice is insufficient, and in so doing has rejected the analysis suggested by this Court in Oscar Mayer. See, e.g., Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977). Thus both cases which the Fourth Circuit looked to for support are suspect following this Court's decision in Oscar Mayer.

The review of this case will enable this Court to clarify any lingering uncertainty arising from Lorillard concerning the proper analysis of an ADEA provision and will resolve the conflict between those courts which have followed the Oscar Mayer

analysis and ruled that unequivocal oral notice is sufficient and those courts which have rejected any comparison to Title VII and have found written notice mandatory.

2. THE DECISION BELOW VIOLATES RECOGNIZED CANONS OF STATUTORY CONSTRUCTION.

The District Court found it "significant" that the House-Senate Conference Report on the 1978 amendments to §7(d) states that the section's requirements "will be satisfied by the filing of a written statement," and concluded that it was "reasonable to assume that Congress always expected that the notice required by §626(d) be written." (Emphasis in the original.) Such an assumption stands in clear opposition to this Court's holding in Oscar Mayer rejecting a similar attempt to substitute legislative history of a subsequent Congress for the intent shown by the language of the actual legislation. 441 U.S. at 758.

Petitioner contends that the intent



of the language in §7(d) of the Act is clear when compared to the similar requirements of Title VII and the notice requirements of §14(b). However, even if the language is ambiguous, recognized cannons of statutory construction mandate that either oral or written notice be allowed:

> Modern social legislation is generally regarded as being remedial in nature . . .
>
> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established. What is called a liberal construction is ordinarily one which makes a statutory rule or principle apply to more things or in more situations than would be the case under strict construction.

Sutherland's Statutes and Statutory Construction, Volume 3, Pages 29, 32. See, also, Oscar Mayer & Co. v. Evans, 441 U.S. at 760; Love v. Pullman Co., 404 U.S. 522, 527 (1972).

Thus the lower courts' failure to properly analyze the text of §7(d) while

relying on subsequent legislative history violates both the specific methodology set forth in Oscar Mayer and the general principles of construing remedial legislation.

3. THE PUBLIC INTEREST FAVORS THE ALLOWANCE OF UNEQUIVOCAL ORAL NOTICE TO SATISFY THE NOTICE REQUIREMENTS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The lower courts have maintained that the primary means of remediation in cases of age discrimination is through the conciliation efforts of the administrative agencies. See, e.g., Reich v. Dow Badische Co., 575 F.2d at 368. In the instant case the petitioner went to the Department of Labor the day after his discharge to inform them of what had occurred and to express his desire to institute suit. In response the staff member of the Department of Labor offered no assistance. This Court held in Oscar Mayer that construction of the Act should be:



> fully consistent with the ADEA's remedial purposes and [be] particularly appropriate "in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process."

441 U.S. at 760 (emphasis added). Given the language of §7(d) and the Department of Labor's failure to adopt regulations calling for their employees to assist claimants in writing their claims, oral notice advances all of the purposes of the ADEA. It should be noted that the Department of Labor has argued that oral notice satisfied §7(d). See, Brief for the United States as Amicus Curiae, Shell Oil Co. v. Cartt, 434 U.S. 99 (1977) (leave to file denied).

It is contrary to all rules of equity that an individual should be penalized due to the failure of the Department of Labor to inform him that his oral notice was insufficient and to institute conciliation efforts on his behalf. This Court has recognized in Oscar Mayer

that the District Court has the power to stay judicial proceedings while administrative remedies are pursued. The purposes of the ADEA can be fully accomplished by remanding and allowing a stay in this case "so as to avoid frustrating [a] potentially meritorious claim[ ] on hypertechnical grounds." 575 F.2d at 374 (dissenting opinion).

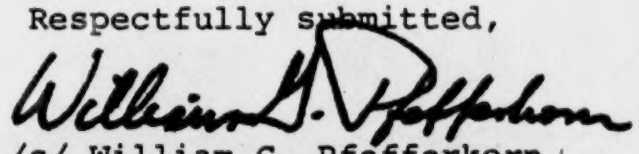
## CONCLUSION

Recognized principles of statutory construction and the public interest in providing comprehensive protection under the ADEA mandate that a procedural requirement not to be read in a needlessly technical manner. Furthermore, the methodology articulated for continuing the ADEA in Oscar Mayer removes any question concerning the adequacy of oral notice under §7(d) of the ADEA. Because of the clarification in Oscar Mayer of some lower courts' doubts that Title VII may be



used in analyzing provisions of the ADEA and the clear distinction between the notice requirements of the two acts, summary reversal would be appropriate in this case.

Respectfully submitted,



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APPENDIX A

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Opinion of the United States Court of Appeals for the Fourth Circuit, No. 79-1038 (January 29, 1980)

PER CURIAM:

The appellant, David W. Carter, Jr., seeks review of the trial court's order granting summary judgment for the appellee, Crown Hosiery Mills, Inc. (Crown), and dismissing Carter's suit, because he had failed to comply with the notice requirements of the Age Discrimination in Employment Act of 1967 (the Act), 29 U.S.C. §626(d).



The central facts in this case are not in dispute. Carter was discharged by his employer, Crown, on September 30, 1974. On October 1, the following day, Carter went to the Wage and Hour Division office of the Department of Labor in High Point, North Carolina, and talked to a staff member, Harold Cox. Carter complained to Cox that his employer had discriminated against him on the basis of his age and stated that he "wanted to start a legal action [,] . . . wanted to file a civil suit against Crown Hosiery Mills for discrimination." Cox, saying that "he didn't see where he could do anything to help" Carter, advised him to see an attorney. Subsequently, Carter did so.

On January 12, 1977, Carter instituted this suit in the United States District Court for the Middle District of North Carolina, alleging that, in dismissing him, Crown had violated the Act. Crown moved for summary judgment. Upon the pleadings and affidavits, as well as Carter's deposition, and after the arguments of counsel, orally and on brief, the District Judge issued a memorandum opinion and entered judgment in favor of Crown, concluding, consistently with the aims of the Act, that Carter's oral statements to Cox were insufficient to constitute the requisite filing of notice of intent to sue. 29 U.S.C. §626(d). His conclusion accords with that reached by the majority of the courts which have considered the issue. See Reich v. Dow Badische Co., 575 F.2d 363, 368 (2d Cir. 1978); Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 764-65 (5th Cir. 1977).

We affirm on the opinion of the District Judge. Carter v. Crown Hosiery Mills, Inc., No. C-77-17-G (M.D.N.C. Nov. 1, 1978).

Affirmed.

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APPENDIX B

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Opinion of the United States District Court for the Middle District of North Carolina, No. C-77-17-G (Nov. 1, 1978).

WARD, District Judge

This case came before the Court on October 25, 1978, on defendant Crown Hosiery's motion for summary judgment. Rule 56, Federal Rules of Civil Procedure. For the reasons set out below, the motion will be granted.

Plaintiff David Carter is suing Crown under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et



seq. It is settled law that before a plaintiff can sue under the ADEA he must comply with the Act's notice requirements as set out in 29 U.S.C. §626(d). Hiscott v. General Electric Co., 521 F.2d 632 (6th Cir. 1975); Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974). That section provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed--
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred ....
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Crown contents, and the Court agrees, that Carter is barred from suing under the ADEA because he never filed a "notice of an intent" to sue with the Department of Labor.

The parties do not dispute the material facts. Crown discharged Carter on September 30, 1974. The next day, October 1, Carter went to a Wage and Hour Division office of the Department of Labor and talked to a Mr. Cox. He told Cox that he had been discriminated against because of his age. He also said he "wanted to

start a legal action[,] ... wanted to file a civil suit against Crown Hosiery Mills for discrimination." At some point in the conversation, Cox said "he didn't see where he could do anything to help" Carter and advised him to see an attorney. Deposition of David Carter, Jr., at 75 (March 9, 1977). Carter thereafter retained an attorney and began this suit on January 12, 1977. To date, Carter has not given the Department of Labor written notice of either his age discrimination charges or his intent to sue Crown.

Crown first learned of Carter's age discrimination charges when this suit was begun two years and four months after the alleged discrimination took place. No official of the Department of Labor has ever spoken to Crown about Carter's allegations or, needless to say, attempted to conciliate the parties' disagreement.

The issue thus raised is whether Carter's verbal declarations to Cox satisfied the "notice" requirements of 29 U.S.C. §626(d). In Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978), the Second Circuit held that a plaintiff's oral statement to a Labor Department official that he would sue when he found a lawyer did not amount to "notice" under §626(d). The Court found that such a statement

> was ill-calculated to discharge the statutory function of presenting the Secretary with an unequivocal notice that the grievant intended to sue, and that, in consequence, he must under the statute
>
> > "promptly notify all persons named [in the notice of intent] as prospective defendants in the action".
>
> Appellant's alleged oral notice had neither the content nor the clarity of expressed purpose needed to fulfill its statutory office. If so uncertain a notice could be thought sufficient, the result could often be obscure protractions and confusion in proceedings that are intended to be quickly prosecuted, while restoration to employment with minimal derangement of the affairs of employers and employee can still be seen as possible. Cf. Dartt v. Shell Oil Co., supra, 539 F.2d at 1259; Powell v. Southwestern Bell Telephone Co., supra, 494 F.2d at 489.

575 F.2d at 368.

The court also found that, although Section 626(d) did not say the notice of an intent to file suit had to be written, it implied as much by requiring that such notice be "filed:"

> There is no policy basis for denying the statutory language its evident meaning. The statute is indeed beneficent, but it enacts its own beneficence on its own terms, and those terms are best adhered to, for they are related to the statutory purpose of seeking prompt relief. While the tax cases interpreting what is now 26 U.S.C. §6511, requiring a claim for refund of tax be "filed" within certain time periods, involve other and more complex considerations, they are clear that, although a

claim for refund may be informal, it must be a written claim.

575 F.2d at 368.

See Lorillard v. Pons, ___ U.S. ___, ___, 55 L.Ed.2d 40, 47 (1978). This Court finds Reich v. Dow Badische persuasive and will follow its holding.

The majority of courts addressing this issue have also held or assumed that the "notice" must be written. See Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761, 764-65 (5th Cir. 1977) ("letter notice"); Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Enos v. Kaiser Industries Corp., 443 F.Supp. 798, 801 (D.D.C. 1978) (and cases cited therein); Hughes v. Beaunit Corp., 12 FEP 1564 (E.D. Tenn. 1976). See also Burgett v. Cudahy Co., 361 F.Supp. 617, 621 (D.Kan. 1973) ("should be provided in writing"). Moreover, the Court finds it significant that the House-Senate Conference Report on the 1978 amendments to §626(d) specifically states that the section's requirements "will be satisfied by the filing of a written statement ...." H.Conf. R.Rep. No. 95-950, 95th Cong., 2d Sess. 12 (1978), U.S. Code Cong. & Admin. News 1006 (1978). The 1978 amendments were plainly intended to broaden employees' ability to sue under the ADEA; yet Congress still required a writing over an oral statement as the means to begin a civil suit. It is, therefore, reasonable to assume that Congress always expected that the "notice" required by §626(d) be written.

The Court has found three district court holdings that an oral statement satisfied §626(d): Noto v. JFD Electronics Corp., 446 F.Supp. 92 (E.D.N.C. 1978);



Sutherland v. SKF Industries, Inc., 419 F.Supp. 610, 615 (E.D.Pa. 1976); and Woodford v. Kinney Shoe Corp., 369 F.Supp. 911 (N.D.Ga. 1973). Only Noto v. JFD Electronics held unequivocally that oral statements were sufficient, however; in Sutherland v. SKF Industries and Woodford v. Kinney Shoe there was substantial evidence that the plaintiffs had been affirmatively misled by statements of Labor Department officials. In any event, this Court declines to follow those holdings. To do otherwise would be to both ignore the statute's language and severely prejudice Crown, which did not learn of Carter's allegations until more than two years after the acts of discrimination are said to have occurred.[1]

---

1. The following language from Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1200 n. 8 (5th Cir. 1975), is particularly worth quoting here:

> We feel constrained to note that, even if the 180 day period could be waived, this is a singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would

The Court will therefore grant defendant Crown Hosiery Mills, Inc.'s motion for summary judgment. A judgment will be entered accordingly.

/s/ Hiram H. Ward
United States District Judge

November 1, 1978

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1. Cont'd.

be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either selpt on his client's rights or did not believe he had any under the statute.

Supreme Court, U. S.
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CROWN HOSIERY MILLS, INC.,
*Respondent*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The question presented by the petitioner does not fully embrace the holding of the lower courts in this action and, if answered, would constitute an advisory opinion . . . . . 5

II. The decision below does not conflict with the principles enunciated in Oscar Mayer & Co. v. Evans for the construction of the ADEA . . . 7

III. The decisions below are in accord with well settled principles of statutory construction. . . . . 12

IV. No significant public interest would be served by permitting oral notification to satisfy the filing requirement of the ADEA. . . . . 14

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

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No. 79-1702

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DAVID W. CARTER, JR.,

Petitioner

v.

CROWN HOSIERY MILLS, INC.,

Respondent

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Crown Hosiery Mills, Inc. respectfully opposes the petition for a writ of certiorari seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on January 29, 1980.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit

is not reported, but is set out in the petition (hereinafter cited as "P") as Appendix A (P 18-19). The opinion of the United States District Court for the Middle District of North Carolina is also not reported, but is set out in the petition as Appendix B (P 20-26).

## JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 29, 1980. The petition for a writ of certiorari was filed within 90 days of that date in conformance with 28 U.S.C. §2101(c). The jurisdiction of the United States District Court for the Middle District of North Carolina was invoked pursuant to the Age Discrimination in Employment Act (hereinafter "ADEA"), 29 U.S.C. §626.



## QUESTION PRESENTED

Did petitioner's conversation with a representative of the Department of Labor satisfy both the "notice" and the "filing" requirements specified in 29 U.S.C. §626(d)?

## STATUTORY PROVISIONS INVOLVED

The following provisions of 29 U.S.C. §626(d), as they existed prior to the 1978 amendment, control this action:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed -- "(1) within one hundred and eighty days after the alleged unlawful practice occurred . . . ."

## STATEMENT OF THE CASE

As summarized in the petition, the facts leading up to the institution of this action are, for the purposes of respondent's motion for summary judgment,

not disputed. Prior to the institution of this action, respondent had no notice of petitioner's allegations of age discrimination. The procedural history of this case is as follows.

On January 12, 1977, approximately two years and four months after petitioner was discharged by respondent, petitioner filed his Complaint, alleging that respondent had discharged him because of "his more-than-average utilization of benefits provided under the employee group health insurance plan for catastrophic medical expenses incurred for and on behalf of his dependant spouse." Petitioner's wife, the insured under said insurance policy, was not employed by respondent. Respondent denied the allegations of the Complaint and stated that it had discharged petitioner for good and proper cause. Respondent moved for sum-



mary judgment on numerous grounds, supported, where appropriate, by affidavits which remain uncontested by petitioner.

On November 1, 1978, Judge Hiram H. Ward entered summary judgment in favor of respondent on the grounds that petitioner's oral statement to the representative of the Department of Labor did not satisfy either the "notice" requirement or the "filing" requirement of the ADEA, 29 U.S.C. §626(d) (P 22-3). Petitioner appealed and the United States Court of Appeals for the Fourth Circuit affirmed, per curiam, on January 29, 1980, for the reasons stated by the district court (P 18-9).

## ARGUMENT

### I. THE QUESTION PRESENTED BY THE PETITIONER DOES NOT FULLY EMBRACE THE HOLDING OF THE LOWER COURTS IN THIS ACTION AND, IF ANSWERED, WOULD CONSTITUTE AN ADVISORY OPINION.

The applicable provisions of 29

U.S.C. §626(d) provide that a plaintiff must give the Secretary of Labor "notice of an intent to file [a civil] action," which notice must be filed with 180 days of the alleged discriminatory event. Petitioner seeks to raise only the issue of whether oral notification is a sufficient filing and does not address himself to the adequacy of the content of the notice given by petitioner. However, Judge Ward addressed himself to both issues and quoted extensively from those portions of Reich v. Dow Badische Co., 575 F.2d 363 (2d Cir. 1978), cert. denied, 439 U.S. 1006, which deal exclusively with the adequacy of the content of the notice. (P 22-3). The oral statements involved in Reich are indistinguishable from those made by petitioner. After next discussing the filing requirement, Judge Ward concluded as follows: "This Court finds



Reich v. Dow Badische persuasive and will follow its holding." (P 24) Thus, the district court's holding embraces an issue not raised by petitioner--the adequacy of the content of the notice given. Petitioner's characterization of the notice as "unequivocal" is not supported by the record and the adverse finding regarding the adequacy of petitioner's notice has not been challenged.

## II. THE DECISION BELOW DOES NOT CONFLICT WITH THE PRINCIPLES ENUNCIATED IN OSCAR MAYER & CO. V. EVANS FOR THE CONSTRUCTION OF THE ADEA.

As pointed out in Marshall v. Chamberlain Manufacturing Corp., 601 F.2d 100 (3d Cir. 1979), the holdings of Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), and Lorillard v. Pons, 434 U.S. 575 (1978), must be read together when interpreting the ADEA, with reference made to the appropriate statute from

which the subject provision is derived rather than exclusively to Title VII (42 U.S.C. §2000e et seq.). Under this Oscar Mayer-Lorillard doctrine, it is not clear that reference to Title VII authority is mandated in this case, as is assumed by petitioner. In Oscar Mayer, the statutory provision at issue was Section 14(b) of the ADEA [29 U.S.C. §633(b)] governing federal-state relations, which section, in the Court's words, is "in haec verba" with section 706(b) of Title VII [42 U.S.C. §2000e-5(c)]. Further, the Court found that the legislative history clearly establishes that Title VII is the source of section 14(b) of the ADEA.

Unlike section 14(b), there are significant differences between the notice and filing provisions of the ADEA and Title VII, even though both are intended to serve the function of prompt investi-



gation and concilation. See, Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974), contrasting the two provisions. The most obvious difference is the ADEA's requirement (prior to 1978) that there be notice of an intent to file a civil action, 29 U.S.C. §626(d), whereas Title VII simply requires a charge of discrimination. 42 U.S.C. §2000e-5(b). As was concluded in Chamberlain Manufacturing, the private right of action under the ADEA was modeled both on Title VII and on the Fair Labor Standards Act (29 U.S.C. §201, et seq.).

In the absence of any indication that the ADEA notice provision has simply been transplanted from Title VII, the courts in this case properly applied the normal rules of statutory construction (see III and IV, infra). Furthermore, there is no indication in the record that

either the district or circuit court considered Title VII analogies inapplicable or would have reached a different result had they specifically considered such analogies. The other circuit court decisions upon which the courts here relied similarly do not reject the appropriateness of utilizing Title VII analogies. Reich v. Dow Badische Co., supra; Hays v. Republic Steel Corp., 531 F.2d 1307 (5th Cir. 1976); Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977). By their silence, it may be safely assumed that, because of the plain and significant differences in language between the two acts, these courts and the courts in this case simply found such analogies uninstructive. Indeed, the Reich court (anticipating Oscar Mayer) showed no hesitancy to rely on Title VII where the similarly (indeed, near identity) of



language clearly indicates a Congressional purpose to pattern the ADEA directly after Title VII in the area of federal-state relations. 575 F.2d at 367, n. 3.

Finally, it is not clear that an application of Title VII analogies would support the petitioner's contentions in this case: Title VII requires that a charge of discrimination be in writing; if this is the source of the ADEA notice requirement, it could be presumed that a writing was also contemplated by the drafters of the ADEA. The failure of the ADEA to specify "in writing" can more reasonably be attributed to the Congressional intent to discard the oath requirement (which is the context of the Title VII requirement of a "charge in writing") than to an intent to discard the procedural safeguards of a writing, particularly in view of the well estab-

lished principle that a requirement of filing necessarily involves a writing. See IV, infra.

The principles enunciated in Oscar Mayer do not require a different result in this case. The Fourth Circuit's decision was rendered eight months after the Oscar Mayer decision and there is no support in the record for the proposition that it disregarded those principles.

## III. THE DECISIONS BELOW ARE IN ACCORD WITH WELL SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION

Contrary to the petitioner's contention, a fair reading of the district court's opinion shows it did not depend on the legislative history of the 1978 amendments to the ADEA, although it did find support there (P 24). Before discussing the amendments, the court first unequivocally held: "This Court finds Reich v. Dow Badische persuasive and will



follow it holding." (P 24). The discussion of subsequent legislation is obiter dictum. Furthermore, it is far from clear that consideration of subsequent legislation is an improper means of divining the original Congressional intent. Many cases have found such subsequent pronouncements to be extremely revealing and in some cases even dispositive*[1], while other cases have attributed little or no weight to the later Congressional declarations.*[2]

The Fourth Circuit affirmed Judge

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*[1] Pipefitters v. United States, 407 U.S. 385, 411-2 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-1 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), Erlenbaugh v. United States, 409 U.S. 239, 243-4 (1972), Souix Tribe of Indians v. United States, 316 U.S. 317, 329-30 (1942) and Great Northern R. Co. v. United States, 315 U.S. 262, 277 (1942).

*[2] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 199-200 (1963) and Oscar Mayer & Co. v. Evans, supra.

Ward on the basis of the cases cited, without mention of the 1978 amendments. In these circumstances, the district court's passing remarks do not constitute "special and important reasons" for granting a writ certiorari.

IV. NO SIGNIFICANT PUBLIC INTEREST WOULD BE SERVED BY PERMITTING ORAL NOTIFICATION TO SATISFY THE FILING REQUIREMENT OF THE ADEA.

The ADEA requires both that notice be given at least sixty days prior to the filing of suit and that notice be filed within 180 days of the alleged discrimination. As the court in Reich stated:

> "There is no policy basis for denying the statutory language its evident meaning. The statute is indeed beneficient, but it enacts it own beneficence on its own terms and those terms are best adhered to, for they are related to the statutory purpose of seeking prompt relief. While the tax cases interpreting what is now 26 U.S.C. §6511, requiring a claim for refund of tax be 'filed' within certain time periods, involve other and more complex considerations,



> they are clear that, although a claim for refund may be informal, it must be a written claim." 575 F.2d at 368-9.

"File" has consistently been interpreted as requiring a writing and such an interpretation has been linked to signficant public policy considerations. United States v. Lombardo, 241 U.S. 73 (1916) (assuring that the act and time of filing do not become disputable facts); Thompson v. Southern Express Co., 147 N.C. 343, 61 S.E. 182 (1908) (written evidence of filing is important where it imposes upon a third party a duty to act); Wrightsman Petroleum Co. v. United States, 35 F.Supp. 86 (Ct. Cl. 1940) (turnover among government personnel heightens the need for a certain, written record); Ritter v. United States, 28 F.2d 265 (3rd Cir. 1928) (the practical difficulty of determining how to "file" an oral claim).

Therefore, it must be presumed that Congress, by including a "filing" requirement, contemplated that a writing would be required.

> "'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.' Standard Oil v. United States, 221 U.S. 1, 59 (1911)." Lorillard v. Pons, 434 U.S. 575, 583 (1978).

In the face of the consistent interpretation of the word "file" and the policy considerations therefor, the petitioner has failed to establish a compelling reason that a writ of certiorari should be granted.



## CONCLUSION

Petitioner has completely failed to establish the "special and important reasons" for the granting of a writ of certiorari, as required by Rule 19 of the Supreme Court Rules. Indeed, the Fourth Circuit holding in this case is in accord with all of the other circuits which have considered these issues. Reich v. Dow Badische, Co., supra; Hays v. Republic Steel Corp., supra; Charlier v. S.C. Johnson & Sons, Inc., supra. Finally, the legislative history of the 1978 amendment unequivocally reasserts the requirement of a written statement, thus assuring that the issues raised in this case will not reoccur hereafter. The petition for a writ of certiorari should

be denied.

Respectfully submitted,

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